Office-Supreme Court, U.S.
FILED
DEC 31 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BOEHRINGER-MANNHEIM DIAGNOSTICS, INC.,
f/k/a HYCEL, INC.,

Appellant,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

STEPHEN J. FEARON
LAWRENCE MENTZ
Counsel for Appellee
Pan American World Airways, Inc.
1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870

TABLE OF CONTENTS

PAGE

Table of Authorities i

Statement of the Case 1

Argument 3

Conclusion 7

TABLE OF AUTHORITIES

Cases: PAGE

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 (1975) 2, 3

Benjamins v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) 4

Block v. *Compagnie Nationale Air France*, 386 F.2d 323 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968) 3

Dalton v. *Delta Airlines, Inc.*, 570 F.2d 1244 (5th Cir. 1978) 3

Finkelstein v. *Trans World Airlines, Inc.*, 15 Av. Cas. (CCH) 17,379 (N.Y. Sup. Ct. 1978) 5

Garcia v. *Pan American Airways, Inc.*, 269 A.D. 287, 55 N.Y.S.2d 317 (App. Div. 1945), *aff'd*, 295 N.Y. 852, 67 N.E.2d 257, *cert. denied*, 329 U.S. 741 (1946).... 5

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 6

In Re Mexico City Air Crash of October 31, 1979, 708 F.2d 400 (9th Cir. 1983) 4

Lautore v. *United Airlines, Inc.*, 16 Av. Cas. (CCH) 17,944 (S.D.N.Y. 1981), *aff'd mem.*, 688 F.2d 816 (2d Cir. 1982) 5

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) 7

Nationwide Horse Carriers, Inc. v. *Johnston*, 519 S.W. 2d 163 (Tex. Civ. App. 1974) 7

Railway Co. v. *Reid*, 222 U.S. 424 (1912) 6

Reed v. *Wiser*, 555 F.2d 1079 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977) 3, 5

Sea-Land Services, Inc. v. *Gaudet*, 414 U.S. 573 (1974) 7

Seth v. *British Overseas Airways, Corp.*, 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964) 4

PAGE

Trans World Airlines, Inc. v. *Franklin Mint Corp.*, 464 U.S. ——, 104 S. Ct. 1776 (1984) 3, 4

Upton v. *Iran National Airlines Corp.*, 450 F. Supp. 176 (S.D.N.Y. 1978), *aff'd mem.*, 603 F.2d 215 (2d Cir. 1979) 5

Statutes:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1976) ..... *passim*

TEX. REV. CIV. STAT. ANN. art. 2226 2

49 U.S.C. §1301(3) 2

49 U.S.C. §1301(4) 2

Other Authorities:

SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW MINUTES, Warsaw, 1929 (R.C. Horner & D. Legrez trans. 1975) 4-5

II CONFERENCE INTERNATIONALE DE DROIT PRIVE AERIEN, 4-12 OCTOBRE 1929, VARSOVIE, ICAO Doc. No. 7838 (1957) 5

No. 84-807

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BOEHRINGER-MANNHEIM DIAGNOSTICS, INC.,
f/k/a HYCEL, INC.,

Appellant,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

Appellee PAN AMERICAN WORLD AIRWAYS, INC.[1] (hereinafter PAN AMERICAN), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the judgment of the Court of Appeals be affirmed on the ground that the question presented is so unsubstantial as not to warrant further argument.

Statement of the Case

This is an appeal from the judgment entered by the United States Court of Appeals for the Fifth Circuit on July 18, 1984 which reversed an award of attorney's fees

---

[1] Pursuant to Rule 28.1 of the Supreme Court Rules, Appellee states that Pan American Corporation is its parent company.

to appellant BOEHRINGER-MANNHEIM DIAGNOSTICS, INC. f/k/a HYCEL, INC. (hereinafter HYCEL) pursuant to TEX. REV. CIV. STAT. ANN. art. 2226 on the ground that a treaty of the United States, the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1976) (hereinafter Warsaw Convention), preempted application of the Texas statute.

Appellant Hycel obtained a final judgment against Pan American in the United States District Court for the Southern District of Texas for damages sustained to cargo transported by Pan American from Brazil to Texas via New York. The transportation was performed pursuant to a contract of transportation (air waybill) which provided for "international transportation" as defined by Article 1 of the Warsaw Convention and which constituted both interstate air commerce and foreign air commerce of the United States. 49 U.S.C. §1301 (3, 4) (1976). Jurisdiction in the district court was founded upon diversity of citizenship and upon general federal question jurisdiction because appellant's claim arose under the Warsaw Convention.

The district court found Pan American liable under Article 18 of the Convention and for common law negligence. With respect to certain types of claims, including one for damage to freight, TEX. REV. CIV. STAT. ANN. art. 2226 provides for recovery of attorney's fees incurred in prosecuting an action if demand for payment of the claim is made and it is not adjusted within 30 days thereafter. The district court awarded attorney's fees to appellant pursuant to art. 2226 in view of the finding of negligence liability under Texas common law and of the existence of diversity jurisdiction, relying upon *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 259 n.31 (1975).

The court of appeals reversed and held that the Warsaw Convention preempts the field in cases where it applies prohibiting reliance on the Texas statute for an award

of attorney's fees. The court of appeals also held no factual basis existed to warrant an award of attorney's fees under the "American Rule". *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975).

ARGUMENT

One of the fundamental purposes of the Warsaw Convention is the establishment of "a uniform body of worldwide liability rules to govern international aviation, which would supersede with respect to international flights the scores of differing domestic laws, leaving the latter applicable only to the internal flights of each of the countries involved." *Reed* v. *Wiser*, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977) (footnote omitted). *Accord Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 464 U.S. ——, 104 S. Ct. 1776 (1984) ("The Convention creates internationally uniform rules governing the air carriage of passengers, baggage and cargo"); *Dalton* v. *Delta Airlines, Inc.*, 570 F.2d 1244, 1245-46 (5th Cir. 1978); *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968). The fact that the Warsaw Convention is in force in over 100 countries is a strong testimonial to the scope of uniformity it has achieved in the area of "international transportation" of passengers, baggage and cargo by air.

The Warsaw Convention does not seek uniformity only in the international context, however. Express language in the Warsaw Convention mandates that it be applied and interpreted uniformly within any particular nation that is a party to the Convention.

> In the cases covered by articles 18 and 19 [cargo, baggage and delay] any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

Warsaw Convention, Article 24(1), 49 Stat. 3020.

In order to achieve uniformity of the law within a nation party to the Warsaw Convention, the Convention creates a cause of action in favor of a consignor or consignee against an air carrier for damage to, destruction or loss of goods carried in "international transportation" as defined by Article 1 of the Convention. Article 18 of the Convention provides the standard for liability and Article 30(3) of the Convention specifies who may bring suit and against whom suit may be brought. Warsaw Convention Articles 18, 30(3), 49 Stat. 3019, 3021; *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 464 U.S. ——, 104 S. Ct. 1776 (1984); *Seth* v. *British Overseas Airways Corp.*, 329 F.2d 302 (1st Cir.), *cert. denied*, 379 U.S. 858 (1964) (Articles 18 and 30 create cause of action for loss of luggage). *See In Re Mexico City Air Crash of October 31, 1979*, 708 F.2d 400 (9th Cir. 1983) (Article 17 creates cause of action for wrongful death); *Benjamins* v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (Article 17 creates cause of action for wrongful death).

The drafting history of the Warsaw Convention demonstrates that the drafters intended the cause of action it created to be the exclusive remedy available in cases to which the Convention applies. The exclusive aspect of the Convention, embodied in Article 24, was emphasized at the drafting table by Sir Alfred Dennis of Great Britain:

> We have at the beginning of the article: ". . . any liability action however founded can only be brought under the conditions and limits provided for by the present Convention."
>
> It's a very important stipulation which touches the very substance of the Convention, because this excludes recourse to common law. . . .

SECOND INTERNATIONAL CONFERENCE ON PRIVATE AERONAUTICAL LAW MINUTES, WARSAW, 1929 213 (R.C. Horner & D.

Legrez trans. 1975) 213, *translating* II CONFERENCE INTERNATIONALE DE DROIT PRIVE AERIEN, 4-12 OCTOBRE 1929, VARSOVIE 140, ICAO Doc. No. 7838 (1957). In addition to the holding of the Fifth Circuit in this cargo case, other courts have found that the Warsaw Convention exclusively[2] governs claims for injuries sustained during international air transportation as defined in the Convention. *See Reed* v. *Wiser*, 555 F.2d 1079, 1090 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977); *Lautore* v. *United Airlines, Inc.*, 16 Av. Cas. (CCH) 17,944 (S.D.N.Y. 1981), *aff'd mem.*, 688 F.2d 816 (2d Cir. 1982); *Upton* v. *Iran National Airlines Corp.*, 450 F. Supp. 176, 178 (S.D.N.Y. 1978), *aff'd mem.*, 603 F.2d 215 (2d Cir. 1979).

To permit appellant in the case at bar to proceed on its non-Convention negligence cause of action would contravene both the express provisions of the Convention and the unmistakable intent of its drafters. *See Garcia* v. *Pan American Airways, Inc.*, 269 A.D. 287, 55 N.Y.S.2d 317 (App. Div. 1945), *aff'd*, 295 N.Y. 852, 67 N.E.2d 257, *cert. denied*, 329 U.S. 741 (1946); *Finkelstein* v. *Trans World Airlines, Inc.*, 15 Av. Cas. (CCH) 17,379 (N.Y. Sup. Ct. 1978). It would be anomalous, indeed, if on an international level the Warsaw Convention were interpreted uniformly while on the national level within the United States a cause of action created by the Convention were subjected to varying laws of the individual states. Uniform treatment within the United States of claims arising under the Warsaw Convention is clearly required to avoid any such anomalous result. The Warsaw Convention's objective of uniformity would be severely frustrated if the extent of liability of an air carrier under the Warsaw Convention for cargo damage depended upon the particular state

---

[2] Where the signatories to the Convention intended that domestic law of a nation party to the Convention applies to a particular matter, the rules of the Convention expressly so state: Article 21 (contributory negligence), Article 24(2) (standing of and allocation among survivors), Article 25 (fault equivalent to wilful misconduct or *dol*), Article 28 (procedure) and Article 29 (running of the statute of limitations). 49 Stat. 3019-21.

within which an action is brought. The doctrine of preemption, therefore, was necessarily applied by the court of appeals to prevent frustration of the Convention's specified objective. *Cf. Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941).

Pan American could have been sued anywhere in the United States where it is subject to personal jurisdiction but, perhaps, only in Texas would it be liable on a cargo claim for attorney's fees. The Texas statute imposing that liability does not even require that there be any nexus between Texas and the damage sustained. In this case, the damage could have occurred outside Texas or, even, the United States. Yet, under appellant's reasoning Pan American is liable for attorney's fees because it was sued in Texas and did not comply with the claim settling procedures set forth in a Texas statute.

It is Article 26 of the Covention, however, that specifies the only procedures that are required with respect to a cargo claim, timely notice in the proper manner by the consignor or consignee to the carrier of the claimed damage. Warsaw Convention, Article 26, 49 Stat. 3020. If requirements with respect to either the presentation or adjustment of claims are to be imposed in addition to those of Article 26, any such requirements should be implemented on a national level rather than on a state-by-state basis. Varying state law claims procedures should not be superimposed on the requirements of the Warsaw Convention. On a claim involving the interstate and international transportation of cargo, Pan American, which conducts operations and has offices throughout the United States and the world, should not be required to alter its claims handling procedures to comply with the Texas statute. *See Railway Co.* v. *Reid,* 222 U.S. 424, 436 (1912).

Inasmuch as appellant's cause of action arises under a treaty of the United States that has as one of its prime objectives uniformity in the law governing "international

transportation", the Warsaw Convention should be interpreted and applied uniformly within the United States so that the extent of liability of the carrier will not be dependent upon the law of the state in which the action is brought but, rather, subject to a uniform Federal standard. *See Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974); *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970).

Moreover, the allegation and finding of negligence under Texas law do not remove the claim from the ambit of the Warsaw Convention as a Federal law requiring that claims arising under it be treated and interpreted uniformly within the United States. *See Nationwide Horse Carriers, Inc.* v. *Johnston*, 519 S.W.2d 163, 169-70 (Tex. Civ. App. 1974).

> Johnston . . . contends that his claim is asserted as a common law suit for damages and is not based upon a bill of lading contract with the interstate carrier. We are of the opinion that Johnston's claim must be considered "as involving a claim for damages to freight arising under federal law" and that the circumstances of the interstate shipment and the uniformity of treatment of freight damage claims are the controlling factors in the case.

Id. Here the claim arose out of a relation created by a contract of carriage, an air waybill, for "international transportation" and, therefore, those same factors are controlling here.

CONCLUSION

To permit application of the Texas statute authorizing an award of attorney's fees if certain state-imposed claims procedures are not followed would undermine the uniformity achieved by the Warsaw Convention on the international level and the uniformity mandated by the Convention on the national level. The judgment of the court

of appeals that the Texas statute is preempted was correct in all respects and this Motion to Affirm should be granted.

Respectfully submitted,

STEPHEN J. FEARON
LAWRENCE MENTZ
Counsel for Appellee
Pan American World Airways, Inc.
1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870

Of Counsel:

CONDON & FORSYTH

Dated: December 18, 1984

Certificate of Service

I hereby certify that I have, this 18th day of December, 1984 served the foregoing Motion to Affirm upon appellant by depositing same in a United States mail box at 1251 Avenue of the Americas, New York, New York 10020 with first class postage prepaid, addressed to Alden D. Holford, counsel of record for appellant, at his post office address, 7322 Southwest Freeway, Suite 670, Houston, Texas 77074.

December 18, 1984

/s/ LAWRENCE MENTZ

Lawrence Mentz
Counsel for Appellee